

1996 CASE DIGEST INDEX

VOLUME 32

Editor's Note: The cases in the Index have been classified to conform to the *Criminal Law Digest* (third edition).

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PART I—STATE CRIMES

1. VALIDITY OF CRIMINAL STATUTES IN GENERAL

§ 1.00 Statute held not void for vagueness

New York People v. Cole, 652 NE2d 912 (1995), 32 CLB 299. Inclusion of conduct with depraved indifference to human life as element of second-degree murder did not render the statute void for vagueness.

3. NATURE AND ELEMENTS OF SPECIFIC CRIMES

§ 3.80 Drug Violations

§ 3.85 —Possession

New York People v. Sanchez, 652 NE2d 925 (1995), 32 CLB 300. Conviction for possession of a specific amount of drugs ordinarily requires proof that defendant was aware of the weight of the drugs he possessed.

§ 3.105 Escape from custody

Connecticut State v. Woods, 662 A2d 732 (1995), 32 CLB 296. Jury instruction permitting defendant's conviction for escape from community residence based on evidence that he failed to report to his parole officer was misleading.

§ 3.110 Family offenses

Iowa State v. Kellogg, 542 NW2d 514 (1996), 32 CLB 483. For purposes of domestic abuse statute, whether a couple are "cohabitating" is a question of fact for the jury.

§ 3.115 —Child abuse

Wisconsin State v. Sostre, 542 NW2d 774 (1996), 32 CLB 386. A live-in boyfriend who voluntarily takes care of a child is a "person responsible for the welfare of a child" for purposes of a sentencing enhancement for child abuse.

§ 3.267 Intentional transmission of HIV virus

Maryland Smallwood v. State, 661 A2d 747 (App. 1995), 32 CLB 89. Defendant, who was aware that he was HIV-positive, committed attempted murder when he attempted to rape a woman without using a condom.

§ 3.270 —Scientific tests

Oregon State v. O'Key, 899 P2d 663 (1995), 32 CLB 203. Results of horizontal gaze nystagmus test are admissible to prove person is under the influence of alcohol, but not to establish that a person's blood alcohol content was above the legal limit.

South Dakota State v. Vandergrift, 535 NW2d 428 (1995), 32 CLB 85. Implied consent law for blood alcohol test does not apply to private blood samples taken by treating physicians or their agents for medical purposes.

§ 3.353 Racketeering

Georgia Green v. State, 466 SE2d 577 (1996), 32 CLB 490. Defendant could not be convicted of "street gang terrorism" absent proof of a pattern of criminal gang activity.

§ 3.412 Witness tampering

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Nebraska State v. Cisneros, 535 NW2d 703 (1995), 32 CLB 199. Paying boyfriend of alleged assault victim not to report the incident to the police constituted witness tampering.

4. CAPACITY

§ 4.10 Insanity—substantive tests

Nevada Miller v. State, 911 P2d 1183 (1996), 32 CLB 488. A person may benefit from the *McNaughton* insanity defense if he shows he was insane during the temporal period that coincides with the crime.

6. DEFENSES

§ 6.20 Entrapment

Massachusetts Commonwealth v. Garcia, 659 NE2d 741 (1996), 32 CLB 391. Court rejected theory of "sentencing entrapment," whereby government agents induce drug dealer to sell larger quantity of drugs than he usually sold so as to obtain enhanced sentence.

PART II—STATE CRIMINAL PROCEDURES, ANCILLARY PROCEEDINGS

8. PRELIMINARY PROCEEDINGS

§ 8.25 Bail

Massachusetts Commonwealth v. Viverito, 661 NE2d 1304 (1996), 32 CLB 487. Holding defendant in custody for thirty hours without bail, arraignment, or a hearing was not grounds for dismissal of the charges in the absence of prejudice to defendant.

9. INDICTMENT AND INFORMATION

§ 9.05 Probable cause

Kansas State v. Bockert, 893 P2d 832 (1995), 32 CLB 203. Defendant's presence in car that held illegal substances, combined with other circumstantial evidence, constituted probable cause that a crime was committed.

§ 10.05 —Indictment held sufficient

Massachusetts Commonwealth v. Leitzsey, 659 NW2d 1168 (1996), 32 CLB 482. Prosecutor could present evidence before the grand jury by reading statements of witnesses and then having witnesses verify the statements.

§ 10.30 Motion to suppress

Minnesota State v. Zanter, 535 NW2d 624 (1995), 32 CLB 90. State could appeal unfavorable ruling on motion to suppress before trial when the evidence in question was critical to state's ability to prosecute defendant successfully.

10. PRETRIAL MOTIONS

§ 10.00 Motions addressed to sufficiency of indictment

11 DISCOVERY

§ 11.00 In general

§ 11.25 —Records

New Hampshire State v. Puzzanghera, 663 A2d 94 (1995), 32 CLB 297. Defendant in drug case could not obtain discovery of police officer's

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file based on bare rumors that he officer had participated in a drug rehabilitation program.

New York People v. DaGata, 652 NE2d 932 (1995), 32 CLB 299. Requiring disclosure of FBI's notes on DNA testing of defendant's and victim's blood was consistent with New York's philosophy of broad pretrial disclosure.

Pennsylvania Commonwealth v. Rucci, 670 A2d 1129 (1996), 32 CLB 489. Denial to full discovery request was not abuse of discretion when defendant failed to show how disclosure would benefit his case and how it was material.

§ 11.35 Sanctions for discovery violations

Illinois People v. Newberry, 652 NE2d 288 (1995), 32 CLB 298. Dismissal of indictment was proper discovery sanction for prosecution's destruction of evidence following discovery request.

§ 12.60 —Misunderstanding

Ohio State v. Engle, 660 NE2d 450 (1996), 32 CLB 485. Plea was not made knowingly and intelligently when defendant wrongly believed she could appeal trial court's rulings and neither prosecutor nor judge refuted that belief.

§ 12.70 Motion to withdraw guilty plea

Massachusetts Commonwealth v. Russin, 649 NE2d 750 (1995), 32 CLB 84. Defendant's claim that his guilty plea was involuntary was denied when he was declared fit to stand trial by court psychiatrist.

§ 12.75 —Grounds

North Dakota State v. Halton, 535 NW2d 734 (1995), 32 CLB 200. Court's rejection of sentence recommended by state was not grounds for withdrawal of plea agreement when defendant was clearly aware of nonbinding nature of sentence recommendation.

12. GUILTY PLEAS

§ 12.35 Duty to inquire as to factual basis for plea

Kansas State v. Shaw, 910 P2d 809 (1996), 32 CLB 488. Trial court's recitation of the elements of the crime coupled with defense counsel's stipulation that plea had factual basis was sufficient inquiry into factual basis for plea.

§ 12.40 Equivocal guilty plea

§ 12.45 Duty to advise defendant of possible sentence

Connecticut State v. Domian, 668 A2d 1333 (1996), 32 CLB 482. Failure to advise defendant of ten-year mandatory minimum sentence was not ground for overturning guilty plea when trial judge advised defendant he would impose ten-year sentence.

§ 12.55 Effect of involuntariness of plea

13. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 13.20 Relevancy and prejudice

Illinois People v. Williams, 649 NE2d 397 (1995), 32 CLB 84. Testimony relating defendant's past actions was admissible because its purpose was not to show propensity to commit crime but rather that defendant had the physical strength necessary to commit crime.

§ 13.50 Proof of other crimes

Connecticut State v. Jones, 662 A2d 1199 (1995), 32 CLB 297. Bifurcated trial is ordinarily required for capital murder charge that depends on proof that defendant previously committed another intentional or felony murder.

§ 13.55 Proof of other bad acts

Arizona State v. Roscoe, 910 P2d 635 (1996), 32 CLB 487. Other bad acts involving "sexual

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aberration" are admissible to show defendant's propensity to commit a similar crime.

Arkansas Clark v. State, 913 SW2d 297 (1996), 32 CLB 387. At trial of man accused of raping his daughter, the daughter was permitted to testify as to other acts of abuse by her father against herself and another girl.

Massachusetts Commonwealth v. Brousseau, 659 NE2d 724 (1996), 32 CLB 485. Relevant evidence is not rendered inadmissible merely because it indicates that defendant may have committed an offense other than that for which she is being tried.

South Dakota State v. Ondricek, 535 NW2d 872 (1995), 32 CLB 202. Evidence of prior bad acts that occurred twenty years earlier was admissible to prove intent and common scheme or plan in child molestation case.

§ 13.70 Circumstantial evidence

§ 13.80 —Flight

North Dakota State v. House, 456 SE2d 292 (1955), 32 CLB 87. Although the defendant returned to his home after allegedly committing murder, evidence indicating that he acted to avoid apprehension warranted the court's instruction on flight to the jury.

§ 13.115 Identification evidence

Rhode Island State v. Andrade, 657 A2d 538 (1995), 32 CLB 83. Defendant's motion to suppress identifications was denied because, despite the suggestiveness of the identification procedures, the victim-witness met the court's standard of reliability.

§ 13.170 Privileged communications

Nevada Griego v. State, 893 P2d 995 (1995), 32 CLB 86. Defendant in a sexual assault of a minor case was entitled to have alleged child-victim examined by an expert in psychiatry when the case against the defendant depended on that child's testimony.

Wyoming Vit v. State, 909 P2d 953 (1996), 32 CLB 385. Defendant's statement to mental-health counselor was not privileged when defendant conveyed to the counselor a threat to a readily identifiable victim.

§ 13.305 Sequestration of witnesses

New York People v. Geraci, 649 NE2d 817 (1995), 32 CLB 85. Witness's grand jury testimony was admissible as direct evidence when witness's subsequent unavailability to testify at trial was proven to be the result of the defendant's misconduct.

§ 13.315 Hearsay evidence

Maine State v. Long, 656 A2d 1228 (1995), 32 CLB 83. Witness may not testify as to a statement made by another if that statement violates the hearsay rule and is offered as the sole proof of the matter asserted.

§ 13.320 Recorded statements

§ 13.321 —Videotaped testimony

Missouri State v. McClintock, 913 SW2d 124 (App. 1996), 32 CLB 480. Videotape of prosecutor's interview with child sodomy victim was admissible; prosecutor's questions were not calculated to lead victim to make particular statement or act in particular way.

§ 13.360 —Declarations of co-conspirators

Massachusetts Commonwealth v. Nascimento, 659 NE2d 745 (1996), 32 CLB 391. Statement of defendant's accomplice was admissible as statement of joint venturer when it was made in the course of a common criminal enterprise and there was corroborating evidence that both parties were joint venturers.

WEIGHT AND SUFFICIENCY

§ 13.380 Sufficiency of evidence

§ 13.385 —Drug violations

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Hawaii State v. Wallace, 910 P2d 695 (1996), 32 CLB 487. Defendant's conviction for promoting a dangerous drug was reversed when inadequate foundation was laid to show that the net weight of the cocaine as measured by the balance was accurate.

§ 13.427 Sex offender profile testimony

Kentucky Tungate v. Commonwealth, 901 SW2d 41 (1995), 32 CLB 204. Psychiatrist's testimony that defendant did not satisfy his "indicators for pedophilia" was inadmissible as unscientific and as invasion of the jury's province.

New Hampshire State v. Cavaliere, 663 A2d 96 (1995), 32 CLB 298. Sex offender profile was not admissible because there are as yet no scientifically reliable indicators of child sexual abuse.

14. TRIAL

§ 14.37 Right to bifurcated trial

Rhode Island State v. Hightower, 661 A2d 948 (1995), 32 CLB 201. In Rhode Island, a bifurcated trial is neither constitutionally mandated nor statutorily authorized.

§ 14.150 Conduct of prosecutor

§ 14.205 —Suppression of evidence

Iowa State v. Romeo, 542 NW2d 543 (1996), 32 CLB 483. Failure to disclose that prosecutor had agreed not to prosecute witness against defendant as a habitual criminal was not material to defendant's guilt.

Massachusetts Commonwealth v. Schand, 653 NE2d 566 (1995), 32 CLB 89. Prosecutor's promise to be fair to potential witness facing criminal charges cannot be construed as secret inducement for favorable testimony; prosecutor has general obligation to be fair.

15 JURY

INSTRUCTIONS

§ 15.60 "Allen" dynamite charge

Nevada Staude v. State, 903 P2d 1373 (1996), 32 CLB 388. "Allen" charge was not unduly coercive when it clearly informed jurors that they were not to give up a conscientious conclusion in order to reach a verdict.

§ 15.130 Duty to charge on essential elements of crime

Connecticut State v. Mozell, 668 A2d 1340 (App. 1996), 32 CLB 481. Flawed instruction on accessory liability was not basis for overturning defendant's conviction when jury was not thereby misled.

§ 15.165 "Missing witness" instructions

South Dakota State v. McGarrett, 535 NW2d 765 (1995), 32 CLB 201. Jury should not be instructed to draw an adverse inference from state's failure to call a witness if witness was available to both parties.

VERDICT

§ 15.305 Duty of trial judge to poll jury or conduct inquiry into juror misconduct

§ 15.310 —Duty of trial judge to grant mistrial

Vermont State v. Martel, 670 A2d 846 (1995), 32 CLB 490. Mistrial was not required when statement given at trial was only slightly more prejudicial than that on voir dire.

§ 15.320 Requirement of unanimity

Washington State v. Fortune, 909 P2d 930 (1996), 32 CLB 385. A jury was not required to agree unanimously on whether defendant committed first-degree murder by premeditating the act of killing the victim during a felony; alternative grounds are permissible.

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§ 15.330 Directed verdict

Arkansas Galvin v. State, 912 SW2d 932 (1996), 32 CLB 480. Directed verdict will be denied when the evidence supporting the jury's verdict is substantial, that is, forceful enough to compel reasonable minds to reach a conclusion.

Kentucky Davis v. Commonwealth, 899 SW2d 487 (1995), 32 CLB 88. The Commonwealth must prove all elements of persistent felony offender status beyond a reasonable doubt; otherwise, an enhanced sentence will be reduced.

PUNISHMENT

16. POST-TRIAL MOTIONS

§ 16.00 Motion for new trial

§ 16.10 —Unconstitutionality of conviction

Illinois People v. Jimerson 652 NE2d 278 (1995), 32 CLB 298. The knowing use of perjured testimony to obtain a criminal conviction violates due process and entitles defendant to a new trial.

§ 17.101 Imposition of restitution

Iowa State v. Klindt, 542 NW2d 553 (1996), 32 CLB 387. Defendant, accused of first-degree murder but convicted of second-degree murder, was not thereby entitled to reduction of amount of restitution for which he was liable.

South Dakota State v. Henjum, 542 NW2d 760 (1996), 32 CLB 386. Imposition of restitution without notification in the plea bargain is a denial of due process, but defendant waived the error by not objecting before the trial court.

§ 17.105 Excessive sentences

Louisiana State v. Baxley, 656 So. 2d 973 (1995), 32 CLB 87. Fact that sentence for solicitation of "unnatural carnal copulation" was harsher than that for prostitution did not render the sentence excessive.

§ 17.125 Multiple punishment—in general

§ 17.145 —Enhancement

California People v. Bland, 898 P2d 391 (1995), 32 CLB 90. Presence of a firearm in close proximity to cache of drugs in defendant's possession is enough to support sentence enhancement for being armed in commission of felony.

§ 17.165 —Consecutive sentences

Pennsylvania Commonwealth v. Graham, 661 A2d 1367 (1995), 32 CLB 296. Death sentences could not be made consecutive to sentences of life imprisonment and term of years.

17. SENTENCING AND PUNISHMENT

SENTENCING

§ 17.10 Pre-sentence report—contents

§ 17.20 —Trial court's reliance upon material not contained in pre-sentence report

Maine State v. Wilson, 669 A2d 766 (1996), 32 CLB 484. Trial court was free to consider unsolicited sentencing recommendations from community members when sentencing individual who raped and killed his own daughter.

Mississippi Reynolds v. State, 658 So. 2d 852 (1995), 32 CLB 90. Defendant, who was "blindsided" at the sentencing hearing by charges not contained in the presentence report, was entitled to new hearing on the issue of his sentence.

§ 17.85 Power to dismiss habitual criminal charge

§ 17.185 —Disbarment of attorney

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Georgia *In re Kennedy*, 466 SE2d 1 (1996), 32 CLB 484. Attorney may not avail himself of the entrapment defense in a disciplinary proceeding.

Iowa Iowa Supreme Court Board of Professional Ethics & Conduct v. Marcucci, 543 NW2d 879 (1996), 32 CLB 489. An attorney may be suspended from practice for the commission of a felony in the absence of moral turpitude or any discernable effect on his law practice.

18. APPEAL AND ERROR

§ 18.00 Right to appeal

Nebraska State v. Schlund, 542 NW2d 471 (1996), 32 CLB 392. An order disqualifying a public defender because of a conflict of interest is not a "final order" subject to appeal.

§ 18.25 Right to counsel

§ 18.30 —Ineffective assistance of appellate counsel

Ohio State v. Reed, 660 NE2d 456 (1996), 32 CLB 485. Defendant's appellate counsel was ineffective for failing to argue that the trial court erred by denying defendant his constitutional right to represent himself.

§ 18.90 Scope of appellate review

§ 18.110 —Failure to object or file bill of exceptions as precluding appellate review

Arkansas Pike v. State, 912 SW2d 431 (1996), 32 CLB 486. Parties are bound by the scope and nature of the objections and arguments presented at trial.

19. PROBATION, PAROLE, AND PARDON

PROBATION

§ 19.10 Revocation of probation

Massachusetts Commonwealth v. Michaels, 659 NE2d 1209 (App. 1996), 32 CLB 481. One court's revocation of probation for unrelated offense did not justify a second court's revocation of probation.

20. PRISONER PROCEEDINGS

§ 20.45 Post-conviction relief

North Dakota Mertz v. State, 534 NW2d 834 (1995), 32 CLB 201. Defendant could not avoid summary disposition of his postconviction relief petition when he failed to use available discovery procedures to seek evidence in support of his case.

PART III—FEDERAL CRIMES

§ 24.15 Bank-related crimes generally

Court of Appeals, D.C. Cir. United States v. Wynn, 61 F3d (1995), 32 CLB 81. Government failed to prove that defendant knew that his structuring of transactions to avoid bank reporting requirements was illegal.

Court of Appeals, 5th Cir. United States v. Allen, 76 F3d 1348 (1996), 32 CLB 383.

Fraudulently obtained funds were "proceeds" under money laundering statute at the time they left the control of the bank.

§ 24.90 False statement to federal department or agency

U.S. Supreme Court United States v. Aguilar, 115 S. Ct. 2357 (1995), 32 CLB 77. Judge's false

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statement to FBI did not constitute obstruction of due administration of justice unless judge knew statements would be provided to grand jury.

§ 24.100 Forgery

Court of Appeals, 7th Cir. United States v. Bell, 70 F3d 495 (1995), 32 CLB 292. Statute making it illegal for a felon to carry a firearm interstate did not violate commerce clause.

§ 24.135 Hobbs Act

Court of Appeals, 6th Cir. United States v. Collins, 78 F3d 104 (1996), 32 CLB 476. Former public official was properly charged under Hobbs Act even though he left office before the conspiracy allegedly ended.

§ 24.220 Perjury

Court of Appeals, 4th Cir. United States v. Littleton, 76 F3d 614 (1996), 32 CLB 381. Mother's allegedly false testimony at suppression hearing in defendant son's murder trial did not constitute obstruction of justice.

25. CAPACITY

§ 25.10 Insanity

§ 25.15 —Burden of Proof

U.S. Supreme Court Cooper v. Oklahoma, 116 S. Ct. 1373 (1996), 32 CLB 474. Oklahoma law presuming defendant is competent to stand trial held violated due process.

26. PARTIES

§ 26.00 Parties, aiders and abettors

Court of Appeals, 6th Cir. United States v. Hill, 55 F3d 1197 (1995), 32 CLB 81. Owners of business were liable as aiders and abettors of illegal gambling establishments.

27. DEFENSES

§ 27.15 Entrapment

Court of Appeals, 1st Cir. United States v. Alzate, 70 F3d 199 (1995), 32 CLB 292. Failure of court to inform jury that paid informant's actions were attributable to the government just as if he were an FBI agent was harmless error.

Court of Appeals, 9th Cir. United States v. Burt, 76 F3d 1064 (1996), 32 CLB 382. Improper entrapment instruction was harmless error.

PART IV—FEDERAL PROCEDURES

28. JURISDICTION AND VENUE

§ 28.00 Jurisdiction of trial court

Court of Appeals, 2d Cir. Frank v. United States, 78 F3d 815 (1996), 32 CLB 476. Statute requiring state and local officials to conduct background checks of potential handgun buyers was constitutional.

Court of Appeals, 8th Cir. United States v. Tucker, 78 F3d 1313 (1996), 32 CLB 476.

Prosecution of Arkansas governor and others by special prosecutor was within prosecutor's jurisdiction.

§ 28.25 Concurrent federal and state jurisdiction

29. PRELIMINARY PROCEEDINGS

§ 29.00 Grand jury proceedings

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Court of Appeals, 4th Cir. United States v. McDonald, 61 F3d 248 (1995), 32 CLB 82. Defect in grand jury proceeding did not require reversal of conviction.

Court of Appeals, 8th Cir. United States v. Jackson, 67 F3d 1359 (1995), 32 CLB 197. Introduction of prejudicial firearms evidence did not outweigh probative value.

31. PRETRIAL MOTIONS

§ 31.00 Sufficiency of indictment

§ 31.10 —Severance

Court of Appeals, 8th Cir. United States v. Shivers, 66 F3d 938 (1995), 32 CLB 196. Court did not abuse its discretion by refusing to sever defendant's trial from that of his codefendant.

§ 34.45 Proof of other crimes to show motive, intent, etc.

Court of Appeals, 1st Cir. United States v. Trenkler, 61 F3d 45 (1995), 32 CLB 81. Error in introduction of statistical data was harmless.

Court of Appeals, 6th Cir. United States v. Merriweather, 78 F3d 1070 (1996), 32 CLB 477. Jury instruction regarding taped conversation relating to another conspiracy required reversal.

32. DISCOVERY

§ 32.00 In general

§ 32.05 —Statements of defendant

Court of Appeals, 1st Cir. United States v. Lanowe, 71 F3d 966 (1995), 32 CLB 291. Failure of prosecution to disclose recorded conversation of defendant required reversal.

§ 34.60 Circumstantial evidence

§ 34.110 —Lie detector test

Court of Appeals, 3d Cir. United States v. Bishop, 66 F3d 569 (1993), 32 CLB 196. Victim's station house "show-up" identification of defendant did not bar in-court identification.

§ 34.135 Privileged communications

Court of Appeals, 2d Cir. United States v. 281 Syosset Woodbury Rd., 71 F3d 1067 (1995), 32 CLB 291. Wife's conversation with husband following arrest was not privileged.

§ 34.170 Cross-examination procedure

§ 34.180 —Impeachment by prior conviction

Court of Appeals, D.C. Cir. United States v. Jones, 67 F3d 320 (1995), 32 CLB 199. Denial of defendant's motion to exclude evidence of prior felony conviction was reversible error.

Court of Appeals, 2d Cir. United States v. Hourihan, 66 F3d 458 (1995), 32 CLB 197. District court did not abuse its discretion in allowing evidence of prior felony.

33. GUILTY PLEAS

§ 33.15 Accepting plea

§ 33.35 —Court's failure to advise defendant of consequences of plea

Court of Appeals, 5th Cir. United States v. Gaudet, 81 F3d 585 (1996), 32 CLB 479. Defendant implicitly waived his right to be prosecuted by indictment.

§ 34.220 Hearsay evidence

34. EVIDENCE

ADMISSIBILITY AND WITNESSES

§ 34.15 Relevancy and prejudice

§ 34.220 Hearsay evidence

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Court of Appeals, 1st Cir. *Levasseur v. Pepe*, 70 F3d 187 (1995), 32 CLB 293. Admission of hearsay modus operandi testimony was harmless error.

Court of Appeals, 5th Cir. *United States v. Tolliver*, 61 F3d 1189 (1995), 32 CLB 80. Statements of two shooting victims were not admissible as dying declarations or excited utterances.

§ 34.230 —Business records exception

Court of Appeals, 3d Cir. *United States v. Skolow*, 81 F3d 397 (1996), 32 CLB 478. Summary of unpaid insurance claims was admissible under business records exception to hearsay rule.

§ 34.235 —Declarations of co-conspirators

Court of Appeals, 2d Cir. *United States v. Rivera*, 61 F3d 131 (1995), 32 CLB 82. Improper reference to defendant's prior incarceration required reversal.

Court of Appeals, 6th Cir. *United States v. Wiedyk*, 71 F3d 602 (1995), 32 CLB 293. Testimony of party's agent was held to be harmless hearsay.

35. THE TRIAL

§ 35.20 Absence of defendant or counsel

Court of Appeals, 5th Cir. *United States v. Davis*, 61 F3d 291 (1995), 32 CLB 82. Trial court did not abuse its discretion in continuing trial despite absence of defendant.

§ 35.100 Discretion to prosecute

§ 35.105 —Improper questioning of witnesses

Court of Appeals, 1st Cir. *United States v. Rivera-Gomez*, 67 F3d 993 (1995), 32 CLB 198. Detective's statement that defendant's companion entered guilty plea did not require reversal.

§ 35.110 —Comments made during summation

Court of Appeals, 1st Cir. *United States v. Levy-Cordero*, 67 F3d 1002 (1995), 32 CLB 198. Prosecutor's remarks in closing vouching for witnesses did not require reversal.

36. THE JURY

SELECTION

§ 36.00 In general

Court of Appeals, 5th Cir. *United States v. Ramos*, 71 F3d 1150 (1995), 32 CLB 290. Trial court did not abuse its discretion in refusing to remove challenged juror.

United States v. Krout, 66 F3d 1420 (1995), 32 CLB 195. Impaneling of anonymous jury was not improper.

§ 36.25 Conduct of voir dire

Court of Appeals, 4th Cir. *United States v. Lancaster*, 78 F3d 888 (1996), 32 CLB 477. Error in voir dire of jury panel was harmless.

INSTRUCTIONS

§ 36.95 Duty to charge on essential elements of crime

U.S. Supreme Court *United States v. Gaudin*, 115 S. Ct. 2310 (1995), 32 CLB 77. Judge was required to submit to jury questions of materiality of allegedly false statements.

Court of Appeals, 1st Cir. *United States v. DiRico*, 78 F3d 732 (1996), 32 CLB 477. Materiality of defendant's false statement was matter for jury.

VERDICTS

§ 36.220 Inconsistent verdicts

Court of Appeals, 2d Cir. *Blisset v. Coughlin*, 66 F3d 531 (1995), 32 CLB 197. Jury error in assessing punitive damages against all defendants did not require reversal of entire verdict.

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37. POST-TRIAL MOTIONS

§ 37.10 Motion to vacate conviction

§ 37.25 —Failure to raise claim at trial or on direct appeal as bar

U.S. Supreme Court Carlisle v. United States, 116 S. Ct. 1460 (1996), 32 CLB 474. District court did not have authority to grant defendant's untimely motion for judgment of acquittal.

Court of Appeals, 1st Cir. Burks v. Dubois, 55 F3d 712 (1995), 32 CLB 79. Failure to object during prosecutor's closing argument precluded habeas review.

§ 37.35 Federal habeas corpus

Court of Appeals, 7th Cir. Dellenbach v. Hanks, 76 F3d 820 (1996), 32 CLB 382. Third petition for habeas corpus was not abuse of writ.

§ 37.65 —Procedure

U.S. Supreme Court Bowersoy v. Williams, 116 S. Ct. 1321 (1996), 32 CLB 475. Court of appeals abused its discretion by staying habeas corpus petitioner's execution.

Lonchar v. Thomas, 116 S. Ct. 1293 (1996), 32 CLB 475. District court was required to stay execution if it could not address merits of habeas petition prior to execution date.

38. SENTENCING AND PUNISHMENT

SENTENCE

§ 38.30 Standards for imposing sentence

U.S Supreme Court Neil v. United States, 116 S. Ct. 763 (1996), 32 CLB 380. Actual weight of blotter paper with absorbed LSD must be taken into account to require mandatory minimum sentence.

Court of Appeals, D.C. Cir. United States v. Dyce, 78 F3d 610 (1996), 32 CLB 478. Government appeal from downward sentencing departure was granted.

Court of Appeals, 1st Cir. United States v. Kelley, 76 F3d 436 (1996), 32 CLB 380. Sentence enhancement for obstruction of justice was proper.

Court of Appeals, 3d Cir. United States v. Maurelio, 76 F3d 1304 (1996), 32 CLB 383. Loss suffered by fraud victims was appropriate measure of fraud damages rather than defendant's gain.

Court of Appeals, 11th Cir. United States v. Blackman, 66 F3d 1572 (1995), 32 CLB 199. Court was entitled to consider defendant's "outrageous conduct" at sentencing hearing.

§ 38.50 Re-sentencing

Court of Appeals, 7th Cir. United States v. Prevatte, 66 F3d 840 (1995), 32 CLB 196. District court was required not to impose sentence exceeding defendant's life expectancy.

PUNISHMENT

§ 38.100 Imposition of restitution

Court of Appeals, 4th Cir. United States v. Henoud, 81 F3d 484 (1996), 32 CLB 479. Order for restitution for all parties harmed by entire fraud was proper.

§ 38.105 Consecutive sentences

U.S. Supreme Court Garlotte v. Fordice, 115 S. Ct. 1948 (1995), 32 CLB 78. Challenge by prisoner serving consecutive state sentences was proper even though first sentence had already expired.

Court of Appeals, 9th Cir. United States v. Scarano, 76 F3d 1471 (1996), 32 CLB 384. Consecutive sentence for second pre-Guidelines count was not "second" punishment for that offense.

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39. THE APPEAL

§ 39.10 Jurisdiction

§ 39.20 —Failure to file timely notice of appeal

U.S. Supreme Court Stutson v. United States, 111 S. Ct. 600 (1996), 32 CLB 380. Issue of defendant's appeal remanded for reconsideration of "untimeliness."

40. PROBATION AND PAROLE

§ 40.05 Revocation of probation

§ 40.15 —Credit for time spent on probation before revocation

U.S. Supreme Court Reno v. Koray, 115 S. Ct. 2021 (1995), 32 CLB 79. Time spent in community treatment center could not be credited toward sentence.

41. PRISONER PROCEEDINGS

§ 41.05 Cruel and unusual treatment

Court of Appeals, 2d Cir. Champion v. Artuz, 76 F3d 483 (1996), 32 CLB 381. Inmate had no due process right to conjugal visit from wife.

§ 41.10 Segregated prison facilities

U.S. Supreme Court Sandin v. R. D. Conner, 115 S. Ct. 2293 (1995), 32 CLB 77. Prisoner did not have liberty interest in most segregated confinement.

Court of Appeals, 2d Cir. Frazier v. Coughlin, 81 F3d 313 (1996), 32 CLB 478. Confinement of prisoner in special unit did not violate his civil rights.

§ 41.15 Freedom of religion

Court of Appeals, 2d Cir. Jolly v. Coughlin, 76 F3d 478 (1996), 32 CLB 381. Refusal to submit to lab medical test on religious freedom grounds was likely to succeed.

42. ANCILLARY PROCEEDINGS

DEPRIVATION OF CIVIL RIGHTS

§ 42.30 In general

U.S. Supreme Court Johnson v. Jones, 115 S. Ct. 2151 (1995), 32 CLB 78. District court's ruling on summary judgment motion in civil rights case was not appealable.

FORFEITURE

§ 42.60 In general

U.S. Supreme Court Libretti v. United States, 116 S. Ct. 356 (1995), 32 CLB 290. Forfeiture provision in plea agreement did not require inquiry into factual basis.

PART V—CONSTITUTIONAL GUARANTEES

43. ADMISSIONS AND CONFESSIONS

GROUNDS FOR EXCLUSION; GENERALLY

§ 43.50 Fruit of an illegal arrest

West Virginia State v. Jones, 456 SE2d 459 (1995), 32 CLB 87. Confession given by

defendant while being held in police custody without probable cause for arrest was not admissible in court.

VIOLATION OF MIRANDA STANDARDS AS GROUNDS FOR EXCLUSION

§ 43.60 Prerequisite of custodial interrogation

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§ 43.70 —Lack of “interrogation” motive

Arkansas Stone v. State, 900 SW2d 515 (1995), 32 CLB 88. Defendant's roadside confession was spontaneous utterance not subject to *Miranda* warnings when defendant initiated the exchange that gave rise to the confession.

§43.75 Necessity and sufficiency of warnings

Court of Appeals, 5th Cir. United States v. Clark, 67 F3d 1154 (1995), 32 CLB 197. Continuing of questioning after defendant said he wanted to go home did not violate *Miranda*.

§ 43.80 —Interpretations by state courts

Kansas State v. Lewis, 899 P2d 1027 (1995), 32 CLB 203. Failure to give *Miranda* warnings to prisoner in custody for ten hours until he had incriminated himself necessitated suppression of his subsequent confession and required a new trial.

§ 43.90 Waiver of *Miranda* rights

§ 43.91 —Interpretations by state courts

Minnesota State v. Wilson, 535 NW2d 597 (1995), 32 CLB 85. Nothing short of an unambiguous and unequivocal invocation of the right to remain silent will be sufficient to invoke *Miranda* protections.

§ 43.105 —Effect of request for counsel

Arizona State v. Spears, 908 P2d 1062 (1996), 32 CLB 389. To invoke the right to counsel during questioning, the request must be sufficiently clear that a reasonable police officer would understand the statement as a request for counsel.

§ 43.115 Silence as an admission

Nebraska State v. Woods, 542 NW2d 410 (1996), 32 CLB 392. A defendant's refusal to give taped statement constitutes silence for *Miranda*.

purposes, even if the defendant has already made a statement that has not been taped.

44. CONFRONTATION OF WITNESSES

§ 44.00 In general

§ 44.05 —Interpretations by state courts

Tennessee State v. Williams, 913 SW2d 462 (1996), 32 CLB 389. Introduction of surveillance photographs into evidence did not violate defendant's federal or state constitutional right to confrontation.

§ 44.15 Co-defendant's out-of-court statements

§ 44.25 —Limitations on right to cross-examine

Court of Appeals, 5th Cir. United States v. Alexius, 76 F3d 642 (1996), 32 CLB 382. Prohibiting cross-examination of the prosecution witness violated confrontation clause.

§ 44.30 Opportunity to cross-examine

Court of Appeals, 5th Cir. United States v. Grandlund, 71 F3d 507 (1995), 32 CLB 293. Denial of defendant's right to confrontation regarding lab results was harmless error.

45. RIGHT TO CROSS-EXAMINE

SCOPE AND EXTENT OF RIGHT GENERALLY

§ 45.25 Waiver

Court of Appeals, 3d Cir. United States v. Goldberg, 67 F3d 1092 (1995), 32 CLB 198. Defendant's threat against court-appointed attorney did not constitute forfeiture of right to counsel.

§ 45.30 —Right to defend pro se

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Court of Appeals, D.C. Cir. United States v. Leggett, 81 F3d 220 (1996), 32 CLB 476. Defendant's questioning of witnesses and presentation of arguments did not violate his Sixth Amendment rights.

Court of Appeals, 1st Cir. United States v. Campbell, 61 F3d 976 (1995), 32 CLB 81. Defendant was not entitled to proceed pro se and to be represented by counsel in same trial.

Connecticut State v. Day, 661 A2d 539 (1995), 32 CLB 83. Defendant was not entitled to a mistrial simply on the basis of alleged mistakes he made during a portion of the trial where he represented himself.

TYPE OR STAGE OF PROCEEDING

§ 45.45 Arraignment and preliminary hearing

Court of Appeals, 6th Cir. United States v. \$100,375.00 in U.S. Currency, 70 F3d 438 (1995), 32 CLB 292. Right to counsel did not apply to civil forfeiture proceedings.

ADEQUACY AND EFFECTIVENESS OF COUNSEL

§ 45.110 Ineffectiveness

Court of Appeals, 7th Cir. United States v. Brown, 71 F3d 1352 (1995), 32 CLB 290. Attorney did not render ineffective assistance of counsel by eliciting unfavorable facts about defendant.

§ 45.120 —Failure to assert available defense

Court of Appeals, 4th Cir. Kornahrens v. Evatt, 66 F3d 1350 (1995), 32 CLB 195. Representation by counsel was not ineffective for failure to offer certain evidence.

Court of Appeals, 8th Cir. Montanye v. United States, 77 F3d 226 (1996), 32 CLB 384. Failure of defense counsel to raise a defense argument did not require reversal.

Weekly v. Jones, 76 F3d 1459 (1996), 32 CLB 383. Failure to pursue insanity defense was not ineffective assistance of counsel.

CONFLICT OF INTEREST

§ 45.150 Representation of co-defendants

Court of Appeals, 5th Cir. United States v. Placente, 81 F3d 555 (1996), 32 CLB 479. Counsel's representation of both defendant and his nephew did not constitute ineffective assistance of counsel.

46. CRUEL AND UNUSUAL PUNISHMENT

§ 46.05 Death penalty

§ 46.10 —Statutory requirements

Court of Appeals, 8th Cir. Reeves v. Hopkins, 76 F3d 1424 (1996), 32 CLB 383. Reweighting under Nebraska's capital punishment scheme did not violate federal due process requirements.

47. DOUBLE JEOPARDY

§ 47.10 When jeopardy attaches

U.S. Supreme Court White v. United States, 115 S. Ct. 2199 (1995), 32 CLB 78. Use of uncharged cocaine importation to impose higher sentence on another drug charge did not bar subsequent prosecution on cocaine charges.

§ 47.20 Mistrials

§ 47.25 —Reason for grant

Court of Appeals, 4th Cir. Gillian v. Foster, 61 F3d 1070 (1995), 32 CLB 80. State trial judge acted without rational justification in granting mistrial.

§ 47.45 Separate and distinct offenses

Court of Appeals, 1st Cir. United States v. Stoller, 78 F3d 710 (1996), 32 CLB 478. FDIC's debarment order did not preclude former bank

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executive's criminal prosecution on double jeopardy grounds.

Court of Appeals, 5th Cir. United States v. Riggio, 70 F3d 336 (1995), 32 CLB 292. Defendant's conviction for conspiracy to commit arson and for use of firearm in the commission of a federal felony did not violate bar against double jeopardy.

Court of Appeals, 10th Cir. Harvey v. Shillinger, 76 F3d 1528 (1996), 32 CLB 384. Prosecution of defendant on conspiracy charges after he had been acquitted of substantive offense was vacated did not violate his right against double jeopardy.

§ 47.50 —Same transaction

U.S. Supreme Court Ruthledge v. United States, 116 S. Ct. 1241 (1996), 32 CLB 475. Conspiracy to distribute controlled substances was lesser included offenses of continuing criminal enterprise.

§ 47.55 Administrative proceedings

Nebraska State v. Hansen, 542 NW2d 424 (1996), 32 CLB 390. The double jeopardy clause does not bar the criminal prosecution of a person for driving under the influence after the administrative revocation of his driver's license for the same offense.

48. DUE PROCESS

§ 48.00 In general

U.S. Supreme Court Ryder v. United States, 115 S. Ct. 2031 (1995), 32 CLB 78. Appointment of civilian judges to Coast Guard Court of Military Review was improper.

Court of Appeals, 1st Cir. United States v. Lopez, 71 F3d 954 (1995), 32 CLB 291. Requiring defendant with brain tumor to complete trial while taking medication was not abuse of discretion.

Court of Appeals, 3d Cir. Yohn v. Love, 76 F3d 508 (1996), 32 CLB 381. Ex parte conversation between prosecution and judge constituted denial of due process.

Court of Appeals, 7th Cir. United States v. Arango-Montoyo, 61 F3d 1331 (1995), 32 CLB 80. Statute precluding collateral attacks on convictions occurring five years earlier did not violate due process.

49. EQUAL PROTECTION

§ 49.10 Discrimination in law enforcement

U.S. Supreme Court United States v. Armstrong, 116 S. Ct. 1480 (1996), 32 CLB 474. Motion for discovery on grounds of selective prosecution based on race was properly denied.

55. RIGHT TO JURY TRIAL

§ 55.00 In general

§ 55.05 —Procedural requirements

Court of Appeals, D.C. Cir. United States v. Dean, 55 F3d 640 (1995), 32 CLB 79. Defendant's Sixth Amendment rights were not violated by quashing of witness subpoenas.

58. PROHIBITION AGAINST UNLAWFUL SEARCHES AND SEIZURES

SCOPE OF EXTENT OF RIGHT IN GENERAL

§ 58.10 Property subject to seizure

§ 58.15 —Plain view

Washington State v. Rose, 909 P2d 280 (1996), 32 CLB 388. Defendant had no expectation of privacy in what could be seen through window

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in natural light, and police officer's use of flashlight at night did not change this result.

§ 58.30 Automobile searches

Court of Appeals, 8th Cir. United States v. White, 81 F3d 775 (1996), 32 CLB 479. Defendant voluntarily consented to search of his automobile.

§ 58.35 Airplane passengers

Court of Appeals, 1st Cir. United States v. Doe, 61 F3d 107 (1995), 32 CLB 82. Warrantless search of property seized at airport was improper.

BASIS FOR MAKING SEARCH AND/OR SEIZURE

§ 58.75 Search warrants

§ 58.90 —Manner of execution

U.S. Supreme Court Wilson v. Arkansas, 115 S. Ct. 1914 (1995), 32 CLB 78. Officers' announcement of their presence before search was factor in determining reasonableness of search.

§ 58.125 Permissible scope of incidental search

Washington State v. Johnson, 909 P2d 293 (1996), 32 CLB 390. A search pursuant to a valid arrest could extend to the sleeping area of a tractor-trailer located behind the driver's seat and connected to the cab by a rubber boot.

ELECTRONIC EAVESDROPPING

§ 58.135 In general

§ 58.145 —Recording devices

South Dakota State v. Ramirez, 535 NW2d 847 (1995), 32 CLB 202. There is no expectation of privacy in a police vehicle; thus, secret tape recording of conversation in back seat of police car was admissible.

§ 58.160 Disclosure of conversations overheard

Court of Appeals, 1st Cir. United States v. London, 66 F3d 1227 (1995), 32 CLB 195. Interception and disclosure of wiretapped conversations relating to offense other than those targeted was not unlawful.

SUPPRESSION OF EVIDENCE IN GENERAL

§ 58.200 Standing

Court of Appeals, 4th Cir. United States v. AlTalib, 55 F3d 923 (1995), 32 CLB 79. Defendant did not have standing to challenge search of third person's vehicle.

60. RIGHT TO SPEEDY TRIAL

§ 60.20 Reason for delay

§ 60.25 —Interpretations by state courts

Hawaii State v. Dwyer, 893 P2d 795 (1995), 32 CLB 86. Defendant's failure to assert his constitutional right to a speedy trial weighs against finding that he was deprived of that right, despite a thirty-two-month delay between the arrest and the start of the trial.

Alabama Ex parte Clopton, 656 So. 2d 1243 (1995), 32 CLB 88. When a delay in bringing defendant to trial is excessive and is the result of unexcused inaction by the state, the delay is *prima facie* prejudicial.

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